**Construction and Design Law: Managing the Network of Interdependent Relationships**

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**Lesson 16: Dispute Resolution**

Over the past several decades, the industry has experimented with many dispute resolution processes. The continual interest in developing and improving alternatives reflects the frequency and complex nature of construction industry claims and disputes, and it also recognizes the devastating impact that unresolved claims can have on projects and relationships. Mediation and arbitration dominate in many segments of the industry, especially concerning large and complex claims. Even so, the industry still generates a large volume of construction litigation. Experienced construction lawyers must be familiar with all the available forums for resolving construction disputes.

First read *Managing Construction Conflict: Unfinished Revolution, Continuing Evolution*, 34 Constr. Law. 13 (Fall 2014), by Thomas J. Stipanowich. This article presents a thorough and scholarly overview of construction industry dispute resolution alternatives. The introduction and Part I provide an important historical perspective. Part II paints a picture of current circumstances and analyzes challenges that alternative processes present for industry participants involved in disputes. Pay special attention to the detailed assessments of mediation and arbitration. Finally, Part III explores five “transformative trends.” All these trends have, in fact, significantly influenced dispute resolution practices in recent years. The sections on “Technology” and “Insights Through Behavioral Science and ‘Big Data’” may prove to be increasingly transformative as dispute resolution practices explore artificial intelligence tools. Note also that Parts I and II briefly mention the statutory adjudication process developed in the United Kingdom, which several other countries have embraced as an efficient process for resolving construction industry disputes. For further information on that process, which has no direct counterpart in the United States, see Carl J. Circo, *Statutory Adjudication: Reflections from a U.S. Academic*, 18 J. Am. Coll. Constr. Laws 1 (Winter 2024).

Now read Parts I and II of *Construction Contract Dispute Resolution—A Practical* *Guide*, 17 Am. Coll. Constr. Laws J. 2 (Winter 2023), by James J. Hartnett. Here you will find a highly practical guide to dispute resolution provisions commonly included in contemporary construction contracts. Also read the introduction to Part III and Section III.A, which provide an overview of the “nuanced potential objectives of construction contract dispute resolution clauses.” Feel free to skip the balance of Part III, which assesses characteristics and advantages and disadvantages of alternative contractual approaches at a granular level that speaks primarily to experienced construction lawyers concerned with drafting dispute resolution clauses tailored to specific clients and circumstances.

An interesting study of construction industry mediation and arbitration was published at around the same time as Hartnett’s article. See Dean Thomson & Julia Douglass, *Comparing Theory and Practice: Survey Results of What Attorneys and Arbitrators Want in Construction Mediation and Arbitration*, 42 Constr. Law. 27 (No. 3, 2023). Among other things, the authors report that their survey of construction lawyers supports the practice of engaging with a proactive mediator at a relatively early stage in a dispute. They summarize this process, alternatively called “Guiding Mediation” or “Guided Choice” mediation, at page 29:

Getting the mediator involved early to help the parties design a successful settlement process are common themes of Guiding Mediation. The dynamics of each dispute are different, but a Guiding Mediator frequently seeks to have confidential discussions with each party and its counsel well before the mediation session in order to become familiar with the parties and their decision-making processes, identify obstacles to resolution, and determine what discrete and specific information may need to be exchanged before a settlement decision can be made. A Guiding Mediator also seeks to ensure that all parties' true decision-makers are involved and prepared to negotiate by the time the mediation session is scheduled.

The authors also report results from their survey of construction industry arbitrators about two topics. The first of these concerned certain arbitration “myths,” and the second identified advocacy techniques that arbitrators find most effective. The survey explored arbitrators’ perspectives on these myths: “(i) parties are unable to obtain discovery in arbitration; (ii) arbitrators do not grant summary judgment; (iii) arbitrators tend to “split the baby” and award an amount somewhere in the middle of parties' positions; and (iv) arbitrators do not follow the law.” The arbitrators’ recommendations for effective advocacy include best practices for organizing and presenting testimony and documents, the advantages of addressing damages early in the proceedings, and the importance of recognizing and respecting fundamental differences between arbitration and litigation.

For Review and Discussion

1. Discuss circumstances in which a client involved in a serious and intractable construction industry dispute might be best served by: (a) litigating the matter in a bench trial; (b) litigating the matter in a jury trial; and (c) arbitrating the matter before a panel of construction industry experts.
2. Explain why so many industry form contracts in common use provide for submitting a dispute to mediation as a condition precedent to arbitration or litigation.
3. Explain why industry participants who anticipate ongoing relationships that will extend over multiple projects may be wise to incorporate a stepped dispute resolution process in their contracts, and discuss the specific steps you might recommend including in such a process.